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March 27, 2000

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Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

RE: Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, Notice of Inquiry

Dear Ms. Salas,

Enclosed please find one original and four copies of Public Comments of The Media Institute in the above captioned proceeding.

We are also furnishing disks to Ms. Wanda Hardy, FCC Mass Media Bureau, and to International Transcription Service, Inc., per Section IV of the Notice of Inquiry.

If you have any questions, please feel free to contact me at the above numbers, or at my direct e-mail, kaplar@clark.net.

Sincerely,

Richard T. Kaplar
Vice President

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of<br>Public Interest Obligations<br>of TV Broadcast Licensees | )<br>)<br>)<br>)<br>) | MM Docket No. 99-360<br><br>NOTICE OF INQUIRY |



# PUBLIC COMMENTS OF THE MEDIA INSTITUTE

March 27, 2000

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## TABLE OF CONTENTS

**Before the**
**Federal Communications Commission**
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| | | |
|---|---|---|
| In the Matter of<br>Public Interest Obligations<br>of TV Broadcast Licensees | )<br>)<br>)<br>)<br>) | MM Docket No. 99-360<br><br>NOTICE OF INQUIRY |

## PUBLIC COMMENTS OF THE MEDIA INSTITUTE

### I. INTRODUCTION

The Media Institute[1] submits these Public Comments on the FCC's Notice of Inquiry in the Matter of Public Interest Obligations of TV Broadcast Licensees (NOI) to emphatically urge the Commission to consider and implement substantial *de*regulation of the commercial television broadcast industry. Such deregulation, including the elimination of most if not all so-called "public interest" obligations, is long overdue and now constitutionally mandated. Moreover, such deregulation is the only rational approach in the radically transformed digital information age of media abundance in the 21st century.

Nothing in the Telecommunications Act of 1996 requires either that the FCC impose new obligations on digital broadcasters or that the Commission continue any current regulations beyond already existing specific statutory mandates.[2] Quite the contrary, the entire thrust of that Act to

[1] The Media Institute is an independent, nonprofit research foundation in Washington, D.C., specializing in issues of communications policy. The Institute advocates and promotes three principles: First Amendment freedoms for both new and traditional media; the maintenance and development of a dynamic communications industry based on competition rather than regulation; and excellence in journalism. The Institute has participated in regulatory proceedings and in select cases before federal courts of appeal and the Supreme Court of the United States. The Institute also conducts research projects and sponsors publications relating to the First Amendment and other issues of consequence to the communications media.

[2] To the extent that some deregulatory measures would require statutory authorization, we urge the Commission to suggest such changes to Congress.

foster competition in, and deregulation of, the communications industry supports our position here. And, strangely, few if any of the issues addressed in the NOI have any relationship to the ongoing transition from analog to digital broadcasting that presumably is the catalyst for the NOI. There is, therefore, no reason now to contemplate additional regulation of broadcasting and every reason to pursue deregulation for the digital era.

Similarly, the Final Report of the President's Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (popularly known as the Gore Commission) that the NOI inappropriately relies on is no basis for any new or old regulation of broadcast television. The Gore Commission was fatally flawed by its highly skewed and unrepresentative composition, its lack of resources, and its inability and unwillingness to address, analyze, or advance any rationale or justification for its sweeping recommendations. The Final Report is simply a wholly unsubstantiated "wish list" from a group of largely pro-regulatory special interests and is entitled to no deference whatsoever.

The Media Institute respectfully suggests that with this NOI the FCC can no longer avoid a searching and difficult inquiry into the central issue that up to now the Commission understandably has been reluctant to engage: Why should broadcasters at a time of indisputable media abundance continue to be singularly relegated to second-class constitutional status and regulated, extensively and intrusively, by the federal government, all in the name of an amorphous, bureaucratically defined "public interest"? The Commission must establish, if it can, a logically, empirically, and constitutionally sound rationale for *each* aspect of government regulation of digital broadcasting or announce the essential absence of any such rationale and move to a deregulatory agenda. If, for example, the Commission wishes to cling to the anachronistic concept of spectrum scarcity, it now must justify for a technologically transformed 21st century a notion that already has long since been discredited even before the digital revolution.

Further, we believe that any such rationale, and *each* specific content-based regulation the Commission advances, must satisfy the strict scrutiny a modern Supreme Court is likely to apply. With respect to any public interest programming regulations, the FCC must bear firmly in mind

the Supreme Court's most recent, directly relevant pronouncement that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."[3] Thus the Commission cannot simply assert important interests in the abstract, but must actually demonstrate that any broadcast regulation it proposes in fact is narrowly tailored to serve a compelling interest that cannot be met in another, less speech-restrictive way.

These Public Comments will first establish that not only is there no reason for the Commission to consider new public interest obligations for television broadcasters, or even to continue such existing regulations into the digital age, but that in fact the Commission should adopt a deregulatory agenda. Then they will demonstrate why the Gore Commission Final Report lacks any credibility and is entitled to no special status before the FCC. Rather, the Commission now should acknowledge the lack of any special justification for content-based government regulation of broadcast programming, beyond that applicable to other mass media, and begin to reverse its unfortunate and deleterious decades-long disfavored treatment of broadcasting. Finally, these Comments will address on their own merits each of the four areas in which the NOI seeks comment and explain why there is no basis for considering any additional regulation of broadcasting in these specific matters.

## II. THE PREMISE FOR NEW REGULATION OF BROADCASTING IS FAULTY

The Telecommunications Act of 1996 (the Act) that provides for the transition to digital broadcasting by assigning initial digital licenses to current broadcast licensees also states: "Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity."[4] The NOI indicates that the FCC relied on this language for its own previous reaffirmation that "digital broadcasters remain public trustees

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[3] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994).

[4] 47 U.S.C. § 336(d).

with a responsibility to serve the public interest" and that "existing public interest requirements continue to apply to all broadcast licensees."[5] This provision also is the premise for the current NOI, but it is a faulty premise, one that not only does not follow from the statutory language but is contrary to the entire purpose and thrust of the Act. The FCC has chosen to adopt a misguided position, one that the Commission can and should abandon in favor of a deregulatory agenda.

This provision of the Act does not itself affirmatively enact, adopt, or continue any regulation or charge the Commission with doing so. Rather, the negative phraseology of the statutory language simply means that Congress itself through this broad legislation was not undertaking to alter any specific, current regulatory or statutory public interest obligations. Indeed, it would have been implausible for Congress to undertake such a detailed task in this panoramic, policy-oriented Act.

The Commission misreads this negative language as affirmatively stating that all current public interest obligations must extend into the digital age. Congress, however, was not in one sentence indirectly codifying the entire panoply of FCC rules and regulations nor at all constraining the FCC from reducing or eliminating administratively imposed requirements. This would be directly counter to the pervasive deregulatory, pro-competitive thrust of the entire Act including the broadcasting provisions. As the Supreme Court has characterized the Telecommunications Act of 1996, it was "an unusually important legislative enactment" whose "*primary purpose was to reduce regulation* and encourage 'the rapid deployment of new telecommunications technologies.'"[6] Indeed, in the section of the Act on broadcast ownership, Congress instructed the FCC to biennially review all its ownership rules, stating: "The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest."[7] Congress did not

[5] NOI, at ¶ 4, *quoting* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809, 12810-11, 12830 (1997).

[6] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857 (1997) (quoting the Act) (emphasis added).

[7] 47 U.S.C. § 161(b).

similarly specifically instruct the FCC with regard to programming regulations, but it hardly precluded such deregulation. At the same time Congress recognized the overriding need for regulatory flexibility with a dynamically evolving broadcasting industry, Congress could not have meant to impose a stagnant public interest regulatory regime based upon decades-old thinking.

The Commission's previous position in its Fifth Report and Order, and the basis now for the current NOI, thus is supported neither by the statutory language, common sense, nor by precedent. To the contrary, clear precedent establishes that the Commission is free to propose, as it should, substantial deregulation of the television industry as we move into the digital era. In 1959 Congress amended Section 315 of the Communications Act to create four categories of news broadcasts exempt from that section's equal opportunities requirements.[8] In doing so, Congress specified that nothing in the amendment "shall be construed as relieving broadcasters ... from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[9] Many people assumed this negative language amounted to a codification of the Fairness Doctrine precluding the FCC from altering or eliminating the doctrine. There even was some support for that interpretation of the statute in some dicta in the *Red Lion* case.[10] Nonetheless, when the issue was squarely presented, two courts of appeals ruled otherwise,[11] and the Commission eliminated the Fairness Doctrine as unnecessary and inimical to First Amendment values in a modern context of abundant electronic media.[12] Likewise now, the Commission not only has no obligation to propose

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[8] 47 U.S.C. § 315(a).

[9] *Id.*

[10] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-82 (1969).

[11] *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 517 (the Fairness Doctrine is just an "administrative construction, not a binding statutory directive"), *reh'g en banc denied*, 806 F.2d 1115 (1986), *cert. denied*, 482 U.S. 919 (1987); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1437-39 (8th Cir. 1993) (accord).

[12] 1985 Fairness Report, 102 F.C.C.2d 145 (1985); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). Elimination of the Fairness Doctrine removed a significant chilling effect on broadcasters and led to more informational

new obligations for digital television broadcasters, but it is in no way precluded by a similarly unwarranted negative implication from the Telecommunications Act of 1996 from considering and recommending elimination of intrusive and unnecessary content regulation. This is exactly what the Commission now should do.

## III. THE GORE COMMISSION'S FINAL REPORT IS ENTITLED TO ABSOLUTELY NO DEFERENCE

The Media Institute shares the troubling concern expressed by Commissioner Harold Furchtgott-Roth in his Separate Statement about an independent federal agency such as the FCC "taking its 'guidance' and 'focus' from an executive branch Committee and the Vice President on issues that are exclusively within our jurisdiction."[13] As Commissioner Furchtgott-Roth also notes, the appearance of inappropriate influence on the FCC is compounded by Vice President Gore's letter to the FCC, at the beginning of his presidential campaign, urging action on several of the Gore Commission's recommendations immediately followed by the issuance of the NOI.[14] And this unfortunate appearance is now even further exacerbated by the book about to be published by former FCC chairman Reed Hundt who acknowledges that he owed his job to Vice President Gore and unabashedly states that, as Vice President Gore's "lieutenant" at the Commission, his mission was to "effectively implement [the vice president's] agenda."[15] We therefore agree with Commissioner Furchtgott-Roth that such Executive Branch involvement, and the FCC's undue

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programming. *See* Thomas W. Hazlett and David W. Sosa, *Was the Fairness Doctrine A "Chilling Effect"? Evidence From the Postderegulation Radio Market*, 26 J. LEG. STUDIES 279 (1997).

[13] NOI, Separate Statement of Commissioner Harold Furchtgott-Roth, concurring in part and dissenting in part (hereafter NOI, Furchtgott-Roth Separate Statement).

[14] *Id.*

[15] Reed Hundt, YOU SAY YOU WANT A REVOLUTION, ___ (Yale, 2000) (<www.yale.edu/yup/chapters/083645chap.htm>, at 6). Mr. Hundt also apparently now admits that his political obeisance to the Administration affected, for example, his push to regulate children's TV programming: "I believed we were helping the President and Vice President win re-election." *This Hundt Was Doggedly Partisan*, THE WEEKLY STANDARD, FEB. 28, 2000, at 3.

reliance on the Gore Commission Report, can only undermine the FCC's action in this matter. On this "procedural" basis alone, the Gore Commission Report should be accorded no weight.

Moreover, the substance of the Gore Commission's recommendations should be substantially discounted given the many failings of that body. The Gore Commission members certainly were well-meaning, competent, hardworking, and conscientious in performing their public service, and The Media Institute certainly means no criticism of them individually. But this Advisory Committee was poorly and inappropriately comprised, lacked adequate resources, and was unable or unwilling to address the central, difficult issues necessary to establish a basis for its Final Report. Before its recommendations -- merely an entirely unsubstantiated wish list by pro-regulatory special interests -- are allowed to develop a life of their own with an unwarranted, authoritative imprimatur, it is important that the process that produced the Final Report, as discussed in this section, be well understood.

The formal impetus for creation of the Advisory Committee in the spring of 1997 was the provision in the Telecommunications Act of 1996 for the transition from current analog broadcast television to "advanced television services" using digital technology to take advantage of the many presumed benefits of the new technology.[16] In fact, however, the more specific impetus for creation of the Gore Commission arose from the Administration's desire to institute some form of campaign finance reform and, in particular, deal with the burgeoning costs of television advertising time for political candidates. As President Clinton made clear as he created the Gore Commission, he expected this body to recommend, and the FCC then to implement, a program for government-mandated free television air time for candidates for political office,[17] a pragmatically and constitutionally dubious idea.[18] Indeed, the President appointed as co-chair of the Commission

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[16] 47 U.S.C. § 336.

[17] *See* William J. Clinton, *Remarks to the Conference on Free TV and Political Reform and an Exchange With Reporters* (March 11, 1997), 33 Weekly Compilation of Presidential Documents, March 17, 1997, at 330, 334; BROADCASTING & CABLE, Feb. 9, 1998, at 80.

[18] *See infra* Part VI D.

Norman Ornstein, a well-known political scientist who long has been a champion of free broadcast time for candidates.[19]

As the remaining members of the Commission were appointed in the fall of 1997, it quickly became apparent that they were representatives of a narrow array of special interests -- a "Noah's Ark" theory of representation according to one member[20] -- each with his or her own stake in some form of continued government regulation of broadcasting. The 22 members included a few broadcasters, including co-chair Leslie Moonves, president of CBS Television. But the strong regulatory interests represented included the founder of Action for Children's Television; the chairman and CEO of the Benton Foundation, "a leading advocate for communications in the public interest"; the executive director and founding member of Native American Public Telecommunications, Inc.; the former executive director of the National Latino Communications Center; the former executive director of the National Asian American Telecommunications Association; Newton Minow, who, as chairman of the FCC in the Kennedy Administration, famously excoriated broadcasters as purveyors of a "vast wasteland"[21]; legal counsel for telecommunications policy for the National Association of the Deaf; the president of the National PTA; and the executive director of the Media Access Project.[22]

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[19] *See Ornstein on Obligations*, BROADCASTING & CABLE, July 14, 1997, at 24. For an informative debate on free air time for candidates see Norman Ornstein and Barbara S. Cochran, *Slate Dialogue: Air Time for Candidates* (Aug. - Nov. 1997) <www.slate.com/Code/ DDD/ DDD.asp?file=Airtime&iMsg>. *See also Radio Address of the President to the Nation* (June 28, 1997) <www.whitehouse.gov /WH/html/1997-06-28.html> ("For years, I have supported giving candidates free time ... [and today] I'm appointing two distinguished Americans to lead a commission that will help the FCC decide precisely how free broadcast time can be given to candidates, as part of the broadcasters' public interest obligations.").

[20] Ken Auletta, *What Will Broadcasters Have To Give Up for Free TV?*, THE NEW YORKER, Nov. 9, 1998, at 34, 35 (quoting Gore Commission Member Newton Minow).

[21] Newton Minow, *Speech to the National Association of Broadcasters*, May 9, 1961, *reprinted in* Newton N. Minow & Craig L. LaMay, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT (1995). In his recent book, Mr. Minow makes clear his view that television has only deteriorated; the emptiness of the television wasteland has been filled with "toxic waste." *Id.* at 7.

[22] *See* Final Report, at 146 (App. G), for biographies of Gore Commission members.

The sole academic and constitutional law expert on the Commission was Cass R. Sunstein, a distinguished and prolific scholar at the University of Chicago Law School. Professor Sunstein, however, is well known for advocating a "New Deal" for speech and considerably greater government regulation of all media, including "more intrusive strategies" for regulating broadcasting, in the name of promoting his notion of deliberative democracy and political equality.[23] As Professor Sunstein acknowledges, his approach would place "severe strain" on "some of the core commitments of current First Amendment law."[24] His idiosyncratic views had considerable influence on the Commission but were not balanced by a more mainstream approach to First Amendment jurisprudence. In particular, the Gore Commission included no strong voice for *de*regulation of broadcasting and greater First Amendment freedom for broadcasters more on a par with that for print media. This imbalance in membership alone undermines the entire Final Report.

We wish to be quite clear that, in our view, none of these special interest voices was *per se* illegitimate for hearing before or representation on the Commission; they certainly deserved to be heard. But the tremendous imbalance on the Commission was both striking and unfortunate. The Commission's Charter called for "balanced representation,"[25] and even the statutory authority for

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[23] *See* Cass R. Sunstein, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, at 82 (1993); Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L.J. 137 (1994); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992); Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995) For some, among many, contrary views, see Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein's DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, 62 U. Chi. Law R. 423, 433 (1995) ("I find Professor Sunstein's thesis unworkable, unnecessary, and dangerous"); Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247 (1994); J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1955 (1995) ("Sunstein's 'Madisonian' theory of the First Amendment is about as Madisonian as Madison, Wisconsin"); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899 (1998). *See generally The Law and Economics of Property Rights to Radio Spectrum*, 41 J. LAW & ECON. (Pt. 2) (1998) (symposium issue).

[24] DEMOCRACY AND THE PROBLEM OF FREE SPEECH, at 50. *See also id.* at xi, xviii, xix.

[25] U.S. Department of Commerce, Charter of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (April 22, 1997), Final Report, at 143 (App. F).

such an advisory committee requires the membership to be "fairly balanced in terms of the points of view represented."[26] Nominees for the Gore Commission were to be evaluated in part on their "[u]nderstanding of the dramatic changes in the interpretation of the public interest standard over the past ten to fifteen years."[27] These criteria were blatantly disregarded. Simply including several broadcaster members, some of whom understandably might have had their own interests primarily at stake,[28] did not add meaningful diversity of opinion. Indeed, it was a broadcaster who championed the chilling idea of imposing a new set of minimal public interest obligations on all broadcasters.[29] And while three broadcasters did join in a partial dissent to the Commission's Final Report,[30] as a political reality no broadcaster subject to current government regulation could risk appearing to disavow concern for the "public interest."[31]

Ironically, then, there was less diversity as to regulatory ideology on the 22-person Gore Commission then there is among the five current members of the FCC. Considering the composition of the Gore Commission, The Media Institute formed its own Public Interest Council (PIC) to monitor and comment on the work of the Commission. Members of the PIC[32] and

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[26] 5 U.S.C., App. 2, § 5(b).

[27] Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, Instructions for Nomination of Members, <www.ntia.doc.gov/pubintadvcom/ACINST.htm>.

[28] *See infra* note 100.

[29] *A Proposal for a Minimum Level of Public Interest Requirements for All Stations and A Voluntary Broadcaster Code of Conduct*, Submitted by James F. Goodmon, President and Chief Executive Officer, Capitol Broadcasting Company, Inc. (June 8, 1998).

[30] Separate Statement of Robert W. Decherd, Harold C. Crump, and William F. Duhamel, Ph.D., Final Report, at 77.

[31] Operating in a regulated industry, broadcasters all too often feel the need to inappropriately compromise their editorial freedom to stay in government's good graces. *See, e.g.*, Marc Lacey and Bill Carter, *In a Deal With the TV Networks, Drug Office Is Reviewing Scripts*, N.Y. TIMES, Jan. 14, 2000, at 1; *Television's Risky Relationship*, N.Y. TIMES, Jan. 18, 2000, at A26. FCC Commissioner Michael K. Powell recently acknowledged this unfortunate tendency in his Oct. 20, 1999, Acceptance Speech for The Media Institute's Freedom of Speech Award, <www.fcc.gov/commissioners/powell>.

[32] Members of the PIC were: Robert Corn-Revere, Esq., a partner at Hogan & Hartson LLP; Professor Robert M. O'Neil, Founding Director, The Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia; J. Laurent Scharff, Esq.; and Laurence

Institute senior staff attended all public meetings of the Commission, participated in conferences designed to provide input for the Commission, and submitted four formal statements to the Commission addressing important issues in the ongoing proceedings.[33] After observing the Commission's first two meetings, the PIC urged without success that the president better diversify the Commission, and increase its credibility, by adding a constitutional scholar with a mainstream approach to First Amendment jurisprudence, an economist, a journalist with a strong news management background, and a technology expert.[34]

The huge imbalance in membership on the Gore Commission then was compounded by the Commission's lack of resources for adequate professional or legal assistance in vital research and analysis; the Commission depended on the financial generosity of its members, even to bear their own travel expenses.[35] Instead, The Aspen Institute's Communications and Society Program, with support of The Markle Foundation,[36] convened three meetings during 1998 on options for broadcast regulation in the digital era. Gore Commission co-chair Ornstein attended all these

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H. Winer, Professor of Law and Faculty Fellow, Center for the Study of Law, Science and Technology, Arizona State University College of Law.

[33] These were: Rodney A. Smolla, *Free Air Time for Candidates and the First Amendment*, Paper No. 2 in the series ISSUES IN BROADCASTING AND THE PUBLIC INTEREST; Laurence H. Winer, *Public Interest Obligations and First Principles*; *Deficiencies of the "Aspen Matrix"*; and *Thinking Outside the Regulatory Box*; Papers No. 1, 3, and 4, respectively, in the series ISSUES IN BROADCASTING AND THE PUBLIC INTEREST.

[34] Letter from Patrick D. Maines, President, The Media Institute, to President William J. Clinton, Dec. 29, 1997.

[35] *See* Final Report, at vii; Charter, *supra* note 25.

[36] The goal of the Aspen Institute's Communications and Society Program is "to promote integrated, thoughtful, values-based decision making in the communications and information policy fields." *See* Aspen Institute Communications and Society Program, <www.aspeninst.org/ dir/polpro/ CSP/C%26S1.html>. In Fall 1997, former FCC chairman Reed Hundt became chairman of the Program's Forum on Communications and Society. *See* Hundt Release, <www.aspeninst.org/dir/polpro/CSP/Press%20Releases/Hundt%20 Release>.

For a description of The Markle Foundation and its extensive involvement with communications policy see Preface, A COMMUNICATIONS CORNUCOPIA: MARKLE FOUNDATION ESSAYS ON INFORMATION POLICY (Roger G. Noll and Monroe E. Price, eds.; 1998).

meetings,[37] but this private effort was no proper substitute for a balanced and adequately funded public Advisory Committee.[38]

As of its very formation, then, the Gore Commission was ill equipped for the tasks it should have undertaken. In his keynote address at the Commission's first meeting, Vice President Gore stated that he did not want to "pre-judge or pre-ordain" the outcome of the Commission's deliberations. Rather, he expected the Commission's work to be "broad" and to begin with "first principles." Indeed, the vice president charged the Commission with the "paramount obligation ... to sustain and strengthen the First Amendment freedoms that are so critical to all media."[39] The Commission, unfortunately, did not take this mandate at face value. The Commission never seriously considered *any* deregulation of broadcasting; from the very beginning a majority did not want to "spend any time" discussing first principles of whether there should be any such obligations and why.[40] Early in the Commission's deliberations a frustrated broadcaster member suggested the Committee needed to hear a range of opinions from a diverse panel of First Amendment experts, only to be brushed aside.[41]

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[37] One member of the PIC attended two meetings, and another member of the PIC was invited to the last.

[38] The Aspen initiative also took a decidedly pro-regulatory approach that heavily influenced the Gore Commission's deliberations and its Final Report. *See* Final Report, at 130 (App. D). *But see* Laurence H. Winer, *Deficiencies of the "Aspen Matrix,"* Paper No. 2 in the series ISSUES IN BROADCASTING AND THE PUBLIC INTEREST (April 1998). Of the 14 reports and papers that comprise The Aspen Institute's final report on its conferences, only one by PIC member Robert Corn-Revere can be described as advocating deregulation. *See* DIGITAL BROADCASTING AND THE PUBLIC INTEREST: REPORTS AND PAPERS OF THE ASPEN INSTITUTE COMMUNICATIONS AND SOCIETY PROGRAM (The Aspen Institute, 1998) (Charles M. Firestone and Amy Korzick Garmer, eds.).

[39] Remarks as Prepared for Delivery by Vice President Al Gore, Presidential Advisory Committee on Public Interest Obligations for Digital TV (Oct. 22, 1997) <www.ntia.doc.gov/pubintadvcom/vp102297.htm>.

[40] Open Meeting of Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (Oct. 22, 1997), online transcript, at 52 <www.ntia.doc.gov/pubintadvcom/octmtg/transcript> (hereafter "Transcript") (comments of Commission Member James Goodmon).

[41] Transcript, Dec. 5, 1997, at 257-59 (comments of Commission Member William Duhamel).

If the era of big government truly is over,[42] that message never reached the Gore Commission. For while the Commission's Final Report acknowledges that "the television medium ... [is becoming] more versatile, flexible, and abundant,"[43] it then ignores the import of this basic fact that undermines the need for, and appropriateness of, government regulation. The Final Report includes 10 specific recommendations for increased regulation of broadcasting but not a single suggestion of where regulation could be reduced or eliminated. Given the technological explosion in new forms of mass media, it is astonishing that the Commission could not find, in the plethora of existing broadcast regulations,[44] a single example of regulation that goes too far, is too invasive of fundamental principles of a free press, and therefore should be eliminated. Such tunnel vision is compelling evidence of the disutility of the Commission's Final Report.

## IV. THE FCC FACES A DAUNTING IF NOT IMPOSSIBLE TASK IN TRYING TO JUSTIFY ANY ADDITIONAL REGULATION OF BROADCASTING

With its current NOI, the FCC now must undertake the same daunting task on which the Gore Commission entirely defaulted.[45] The FCC now must fully justify all new (or old) regulation of broadcasting in an empirically and logically consistent way that takes full account of the radically transformed digital information age of the 21st century with an ample, diverse abundance of electronic media. Wax museum arguments from an earlier age will no longer do to perpetuate a pervasive regulatory system that has outlived any purpose it once may have served.

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[42] President William J. Clinton, *State of the Union Address* (Jan. 23, 1996), 32 Weekly Compilation of Presidential Documents, Jan. 29, 1996, at 90.

[43] Final Report, at 44.

[44] *See* NOI, at ¶ 2.

[45] *See* 1998 Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35, *Notice of Inquiry,* 13 FCC Rcd 11276, 11301 (1998), Separate Statement of Commissioner Harold Furchtgott-Roth (stating the FCC is now obliged to review the factual underpinings of the spectrum scarcity rationale); Michael K. Powell, *Willful Denial and First Amendment Jurisprudence*, speech delivered to The Media Institute (April 22, 1998) <www.fcc.gov/commissioners/powell> ("[T]he time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace.").

Having purposely ignored the major "first principle" facing it, the best the Gore Commission could do was to dust off the hoary scarcity rationale and assert that "[a]s a free and ubiquitous medium, over-the-air television has been and will continue to be a central, defining force in American society" and therefore (in a major *non-sequitur*) needs to be regulated.[46] The NOI does no better in merely stating that "[g]iven the impact of their programming and their use of the public airwaves, broadcasters have a special role in serving the public,"[47] presumably as mandated by the FCC. In fact, the continuing role and impact of broadcast television in the 21st century is highly uncertain. But to the extent broadcasting remains an important part of the mass media, that is precisely why broadcasting, like the rest of the press, must be free of government control. Any argument that uses the importance or effectiveness of a medium of communication as a basis to justify government regulation of the medium stands the First Amendment on its head.[48]

A. The FCC Must Consider the Appropriate Media Marketplace

The FCC must not repeat the error of the Gore Commission that asked simply whether "the broadcast marketplace *by itself* is not adequately serving public needs."[49] It is troubling enough for a governmental entity to inquire into such a sensitive question about a segment of the ostensibly free press. A presidential Advisory Committee concerned with broadcasting as one component of a revolutionary new media era of proliferating forms of electronic digital communications, with exponentially increasing choices and opportunities for consumers, should have urged that all aspects of government regulation for all such media be re-examined together in this transformed context. If the FCC pursues such an inquiry, as presumably it must under the NOI, the

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[46] Final Report, at 1.

[47] NOI, at ¶ 1.

[48] *See Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

[49] Final Report, at 17 (emphasis added).

Commission at least should ask the only meaningful question: Are those needs being met in the *entire* media marketplace?[50]

An appropriate and accurate definition of the market is the essential first step in any evaluation of government regulation. The FCC now must do what the Gore Commission never bothered to do, namely take account of the FCC's own readily available statistics as to the overall video marketplace and the ever more limited role broadcasting plays in a modern environment of numerous multichannel video programming distributors (MVPD) including: cable, direct broadcast satellite (DBS), home satellite dishes (HSD), wireless cable (both multichannel multipoint distribution service (MMDS) and local multipoint distribution service (LMDS)), the instructional televison fixed service (ITFS), satellite master antenna television (SMATV), the Internet, and home video sales and rentals.[51]

Of the 98 percent of American homes that are "television households," 81.4 percent subscribed to one or another of the MVPD services as of mid-1999, a yearly increase of 3.2 percent.[52] Thus less than 19 percent choose to rely on traditional, terrestrial over-the-air broadcasting.[53] And this is a meaningful choice. DBS is available everywhere in the continental United States and increased its subscribership by 40 percent (from 7.2 million to 10.1 million) in the last year alone.[54] Cable also is virtually universally available, passing 98 percent of television

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[50] *See* Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, and Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8, *Report and Order*, 14 FCC Rcd 12903, 13001 (1999), Dissenting Statement of Commissioner Harold Furchtgott-Roth (stating the FCC "has taken an excessively narrow view of the communications outlets that qualify to be counted under its ownership rules").

[51] *See* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230, *Sixth Annual Report*, at 3-4 (Jan. 14, 2000). *See generally* Bruce M. Owen, THE INTERNET CHALLENGE TO TELEVISION (Harvard, 1999).

[52] *Sixth Annual Report*, at 4.

[53] This figure might be slightly larger as a few households may subscribe to more than one MVPD service.

[54] *Sixth Annual Report*, at 4. This increase in subscribership occurred even without DBS's ability to provide local broadcast signals within local television markets. As of Nov. 29, 1999, a revised Satellite Home Viewer Act, Pub. L. No. 106-113, § 1000(9), 113 Stat. 1501, now enables such service.

households, and continued its substantial growth in virtually all respects.[55] Few need rely on terrestrial broadcasting. While subscribing to an MVPD is not free in the same sense as is broadcasting, neither is subscribing to most print media, and there is no compelling reason why media access generally must be free. Moreover, the cost of an MVPD is not much different from the full expense involved in one or two outings per month by a couple or family for a movie, sports event, or other substitute entertainment. It therefore is not surprising that the vast majority of Americans willingly use a portion of their discretionary spending for some form of MVPD service.

Broadcasting, however, continues its decline in viewership. Once overwhelmingly dominant, the four major networks (ABC, CBS, NBC, and Fox) had a combined share of only 52 percent of prime time viewing among all television households during the 1998-99 television season, a drop of 3 percent, while the two newest networks (UPN and WB) dropped a point with a combined 8 percent share.[56] For cable subscribers, non-premium cable networks and pay cable services now account for about 57 percent of 24-hour viewing, a point ahead of programming originating on local broadcast television stations.[57] In attracting both viewers and advertisers, broadcasters clearly are feeling the competitive pinch.[58]

And then there is the wondrous phenomenon of the Internet, strangely entirely absent from the Gore Commission Report purportedly focusing on the digital age of electronic communication. By July 1999, 42 million households were connected to the Internet and more than 100.7 million adults used the Internet.[59] Without doubt these numbers have increased markedly even since then

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*See* Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Interest Obligations, MM Docket 93-25, *Report and Order*, 13 FCC Rcd 23254 (1998) (declining generally to impose broad public interest obligations on DBS providers).

[55] *Sixth Annual Report*, at 6-7, 11.

[56] *Id.* at 49.

[57] *Id.* at 49-50 (audience shares exceed 100 percent due to multiple set viewing).

[58] *Id. See* Bill Carter, *TV Networks Are Scrambling to Deal With Era of New Media*, N.Y. TIMES, May 17, 1999, at A17.

[59] *Id.* at 53 n.407.

and will continue to do so as the cost tumbles. Last year one could buy an Internet-ready computer and subscribe to an online service for less (about $500) than it costs to buy many a television and subscribe to an MPVD.[60] Now, a simple, inexpensive (about $99) device allows people to connect to the Internet without a full-fledged personal computer, and even this hardware can be "tweaked" for an additional $100 in parts to work "like a fancy PC."[61] In the past year, "the most significant convergence of service offerings has been the pairing of Internet service with other service offerings."[62] Additionally, 73 percent of the nation's public libraries, including branches, now offer basic Internet access to their patrons.[63]

Any modern discussion of public interest regulation of broadcasting must seriously and thoroughly consider the dramatically evolving nature of the electronic media cornucopia. This is the essential context for evaluating the need for such continued regulation of broadcasting -- what, if anything, actually will be accomplished by such government oversight -- and the various costs of such government regulation, not least in terms of continued denigration of First Amendment principles of a free press.

B. Scarcity Is As Dead As Rosencrantz and Guildenstern

Up to now the only rationale for virtually all public interest regulation of broadcasting (aside from the discrete issue of indecency) has been the supposed physical scarcity of the broadcast spectrum that for much of its history was the only electronic medium of mass communication.[64] Physical scarcity was asserted to be the unique, distinguishing characteristic of

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[60] Peter H. Lewis, *Good Enough Computers*, N.Y. TIMES, Feb. 18. 1999, at D1.

[61] Amy Harmon, *Courtesy of Amateurs, a $99 Personal Computer*, N.Y. TIMES, March 18, 2000, at B1.

[62] *Id.* at 5. *See also infra* note 119. *See generally* Bruce M. Owen, THE INTERNET CHALLENGE TO TELEVISION (Harvard, 1999).

[63] John Carlo Bertot and Charles R. McClure, the 1998 National Survey of U.S. Public Library Outlet Internet Connectivity (ALA Office of Information Technology Policy, October 1998).

[64] *See Turner Broadcasting*, 512 U.S. at 637-38, 640.

broadcasting that allowed it to be regulated in ways that could not be tolerated under the First Amendment for other media. The scarcity rationale always has been a highly dubious and problematic notion both empirically and in theory[65] with respect to: (i) the empirical nature and extent of any such scarcity; (ii) why this asserted scarcity, even if actual and physical in nature, should be a predicate for regulation since scarcity in some form is *the* basic economic fact of life affecting all media and as such cannot justify selective regulation; and (iii) even if broadcasting suffers some special form of scarcity, specifically how does this justify each particular aspect of regulation, especially that which is content-based? Scarcity now can have no further talismanic significance given the ongoing explosion in new forms of electronic media and new sources of information. Courts, commentators, members of the Gore Commission, and even some FCC Commissioners realize this,[66] and accept the obvious fact that, whatever legitimate life it once may have had, and whatever some might wish to imagine about its continued vitality, spectrum scarcity

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[65] The classic critique goes back to Nobel Laureat Ronald Coase's seminal papers, Ronald H. Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1 (1959); Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). *See* Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J. LAW & ECON. 393, 419 (1995) ("The broadcast spectrum holds a special, almost holy, place in the economic analysis of law and the economics of property rights."); Ronald H. Coase, *Law and Economics at Chicago*, 36 J. LAW & ECON. 239, 248-50 (1993) (describing the issue of property rights in the electromagnetic spectrum as being central to development of law and economics analysis at the University of Chicago).

[66] *See, e.g., Turner Broadcasting*, 512 U.S. at 637-39; *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984); *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998); *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc, with whom Edwards, C.J., and Silberman, Ginsburg, and Sentelle, J.J., concur); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (1995) (Edwards, C.J., dissenting); *id.* at 684 (Wald, J., dissenting), *cert. denied sub nom. Pacifica Foundation v. FCC*, 516 U.S. 1043 (1996); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442-43 (8th Cir. 1993) (Arnold, C.J., concurring in the judgment); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J., concurring), *cert. denied*, 493 U.S. 1019 (1990); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 506-09 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

Two members of the FCC have noted the Commission's obligation to review the empirical basis of the spectrum scarcity rationale as the underlying premise of much of the FCC's regulatory scheme. *See* 1998 Biennial Regulatory Review, *supra* note 45, Separate Statements of Commissioners Harold Furchtgott-Roth and Michael Powell.

as a justifying rationale is now dead, if not quite yet buried.[67] Those who would continue to rely on a concept of scarcity first must carefully define the concept they would invoke -- for example, is it allocational scarcity, numerical scarcity,[68] or some other concept. Next they must demonstrate that it exists to a significant and unique degree in those media they would regulate. Then they must establish a close nexus between the condition and the regulation it supposedly supports.[69] No such plausible argument can be fashioned; only those desperate to maintain government regulation of broadcasting hang on to the discredited anachronism of scarcity out of the justifiable fear that there is nothing to replace it to achieve the desired regulatory end. But this approach just demonstrates the bankruptcy of such an enterprise.[70]

There is no need here to replay the death of scarcity. An FCC that must look to the digital, electronic future that already includes broadcasting, cable, satellite, microwave, VCRs, new telephone technologies, and the Internet -- not to mention the next revolutions sure to emerge from the laboratory -- cannot be so wedded to the past.

So, if the shibboleth of scarcity can no longer be relied on, the central question becomes whether the Commission can develop and support any other rationale that adequately justifies regulation -- especially content-based programming regulation -- of broadcasters under the amorphous notion of the "public interest." The heavy burden to do so clearly lies on the Commission;[71] the strong presumption must be that broadcasters, like all other members of the

[67] "[S]carcity is gone ... as a basis for government regulation of broadcasting. The courts have been very clear on that." Gore Commission Member Professor Cass Sunstein, Transcript, Oct. 22, 1997, at 133.

[68] *See Syracuse Peace Council*, 867 F.2d at 682-84 (Starr, J., concurring).

[69] *See Radio-Television News Directors Association v. FCC*, 184 F.3d 872, 883 (D.C. Cir. 1999).

[70] *See* Michael K. Powell, *supra* note 31 (describing the "scarcity fiction" as a "willful denial of reality in order for government to retain the power to control speech, unimpeded by the First Amendment, [that is] a subversion of the Constitution").

[71] *See Radio-Television News Directors Association*, 184 F.3d at 887-88 (holding that FCC has not yet satisfied its burden of justifying non-repeal of personal attack and political editorializing rules).

press, are protected by the First Amendment from such government regulation. Thus, in advance of the FCC's attempt to articulate a convincing theory of regulation, there is no need to address all the imaginable possibilities. But to illustrate the daunting task the Commission faces whatever theories it advances, consider the slogan implicit in the NOI -- the idea that broadcasters use the "public airwaves" and that therefore the content of their programming can somehow be peculiarly regulated in the name of the public interest.

C. There Is No Such Thing As Public Ownership of the Spectrum

Does the public own the electromagnetic spectrum, and does this justify government public interest regulation of broadcasters' use of the spectrum? Well, surely the very concept of spectrum ownership *per se*, public or private, is meaningless and cannot by itself justify anything. Electromagnetic radiation, a fundamental force of nature, is not subject to ownership any more than is gravity; public ownership of the spectrum here is simply a way of stating a predetermined conclusion in favor of government regulation, a conclusion that needs other independent support. No one would assert government ownership of gravity as a justification for regulation -- say, to support a federal excise tax on automobiles for the privilege of keeping a car "on" the road. This is not to say that such an excise tax or traffic control regulation could not be otherwise justified. But the mere assertion of public ownership of the airwaves -- with the corollary notion of broadcasters as public trustees of the frequencies they are allowed to use -- adds nothing to the debate which must proceed on other bases.[72]

After all, newspapers (as well as cable operators) also use public rights-of-way -- the streets and sidewalks -- to distribute their messages. Newspapers also use the spectrum in the form of satellite transmissions to gather the news and sometimes for transmission of page layouts to distant printing plants. News trucks burden the streets, news racks and kiosks burden the sidewalks, and newsprint and newspaper litter burden the environment. Yet no one suggests that

[72] *See* Glen O. Robinson, *Spectrum Property Law 101*, 41 J. LAW & ECON. 609, 620 (1998) ( "the public ownership claim here is a trope, a way of reifying the government's claim to regulatory authority").

any of this provides a basis for content regulation of newspapers, even though in some sense such regulation might "improve" the papers and render a public service. Why should broadcasters, or other electronic media, be subject to content regulation any more than newspapers?

Similar careful analysis is necessary whatever other rationales the Commission relies on whether it is: some peculiar, supposed "market failure" in broadcasting;[73] the myth of a "give-away" of digital spectrum with an allegedly resulting *quid pro quo* due from broadcasters in the form of content regulation; the notion of "voluntary" compliance by broadcasters; a "pay-or-play" model that in reality is just coerced, unconstitutional conditions imposed on government largesse; or some idiosyncratic concept of First Amendment "values" to be furthered by government intervention in broadcast programming.[74]

D. Any Regulatory Rationales Must Survive Strict Scrutiny

Whatever rationale(s) the FCC now advances to support content-based regulation ultimately will have to survive heightened, strict judicial scrutiny and not merely the "peculiarly relaxed"[75] First Amendment review that has sufficed up to now. The Supreme Court both expressed doubts about continued reliance on scarcity and hinted at heightened review in *FCC v. League of Women Voters.*[76] In *Turner*, the Court further acknowledged its doubts about scarcity and emphasized the "limited" and "minimal" control the Commission can exercise over broadcast programming.[77] The Commission must demonstrate that its regulation furthers a compelling state interest that cannot be

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[73] The Court in *Turner Broadcasting*, 512 U.S. at 640, rejected the mere assertion of dysfunction in a speech market as an adequate regulatory rationale.

[74] Justice Stewart once presciently warned of "the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values.'" *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 145 (1973) (Stewart, J., concurring).

[75] *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc).

[76] 468 U.S. 364 (1984) (invalidating a statutory ban on editorializing by public broadcast stations that receive federal funds from the Corporation for Public Broadcasting).

[77] *Turner Broadcasting*, 512 U.S. at 649-52.

adequately addressed by other, less speech-restrictive means.[78] Importantly, mere assertions to this effect are not enough; the FCC must actually demonstrate that these conditions are met.[79] The only way to do this is to concretely establish, with clear and convincing evidence, the logical and empirical link between each specific regulation and the compelling interest it allegedly serves while, at the same time, eliminating any reasonably available less speech-restrictive alternative.

In other words, the FCC can no longer rely on rote invocation of the "public interest" standard to sustain broad content-based regulation of broadcasting as, in effect, a public utility.[80] This is true for three reasons. First, as the Supreme Court has noted, "the 'public interest' standard necessarily invites reference to First Amendment principles."[81] And this involves not only the interests of broadcasters as speakers but also the public's interest in a free and unfettered press, not one managed by a government agency even for ostensibly good purposes. "Serving the public interest" is not synonymous with government-mandated content controls and compelled speech.

Second, notions of the public interest in broadcasting necessarily change over time, especially as this concept has never been defined with any precision. Not long ago the FCC's Fairness Doctrine was "'the single most important requirement of operation in the public interest -- the '*sine qua non*' for grant of a renewal of license.'"[82] A decade later a forward-looking,

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[78] *See* Michael K. Powell, *supra* note 31 ("the governor should not imbibe the wine of content control without deeply compelling justifications").

[79] *Turner Broadcasting*, 512 U.S. at 664.

[80] Indeed, continued unsupported invocation of a vague and undefined "public interest" standard may create problems under reinvigorated attention to the non-delegation doctrine. A federal agency such as the FCC must regulate only pursuant to "intelligible principles" to avoid an unconstitutional delegation of legislative power. *See Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring); *American Trucking v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3496 (U.S. Jan. 27, 2000) (No. 99-1257); *See generally The Phoenix Rises Again: The Nondelegation Doctrine From Constitutional and Policy Issues*, 20 CARDOZO LAW REV. 731-1018 (1999) (symposium issue); Gary Lawson, *Delegation and the Constitution*, 22 REGULATION NO. 2, at 23 (1999).

[81] *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 122.

[82] Fairness Report, 48 F.C.C.2d 1, 10 (1974) (quoting Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283, 292 (1970)).

deregulation-oriented Commission reevaluated the doctrine in light of modern media conditions and courageously eliminated it as both unnecessary and inimical to First Amendment values.[83]

Our system of a highly regulated broadcast medium originated early in the last century as an overreaction to the chaos of a medium emerging without an effective means of ensuring necessary property rights in use of the spectrum. At the time, the new technology was poorly understood -- Congress was regulating the "ether" -- and its potential vastly underappreciated.[84] Moreover, First Amendment jurisprudence was in its infancy. All this has changed dramatically. The digital information age of the 21st century, with a mature notion of the importance of a free press, bears little resemblance to a nostalgic view of a bygone "golden age of television." The "public interest" in a dynamic, digital, electronic age of media abundance demands that broadcasting finally emerge from its constrained status as a governmentally regulated utility and join the ranks of the free press.[85]

### E. The FCC Should Expand and Strengthen Public Broadcasting While Deregulating Commercial Television

Finally, with regard to many aspects of public interest regulation, the era of digital television offers a clear, less speech-restrictive alternative. This alternative is based upon a simple but powerful idea presented to the Gore Commission by its member Robert W. Decherd,[86] that was enthusiastically received at first but subsequently buried in the Commission's Final Report.[87] The key elements of this plan rely on the two 6 MHz channels, one analog and one digital, that

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[83] *See* 1985 Fairness Doctrine Report, 102 F.C.C.2d 143 (1985); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

[84] *See CBS v. Democratic Nat'l Comm.*, 412 U.S. at 144 (Stewart, J., concurring).

[85] More than a quarter-century ago the Supreme Court recognized that, with an industry as technologically dynamic as broadcasting, regulatory approaches could quickly become outmoded. *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 117.

[86] Mr. Decherd is Chairman of the Board, President, and CEO of Texas-based A. H. Belo Corporation, which owns 17 network-affiliated television stations, three local or regional cable news channels, and six daily newspapers.

[87] Final Report, at 50-52.

public television stations, like all broadcasters, will operate during the transition to digital transmission. Once the transition to digital is complete, broadcasters will have to relinquish the analog channel. The Decherd plan, however, would allow one PBS station in each market to retain (and presumably digitize) this second channel to devote to educational and instructional purposes appropriately defined, perhaps in cooperation with state and local school authorities, and perhaps on an interactive basis.[88] This second 6MHz of spectrum, especially if eventually multiplexed, also could be used for public access by independent program producers, local community public access, free air time for political candidates, and other non-entertainment public interest purposes.

The attraction of this scheme is that it seems to offer great promise at little immediate cost; foregoing the recapture of one additional 6 MHz channel per market seems easy for the government to bear. But the plan is hardly free from difficulties. Some governmentally related entity necessarily would be responsible for apportioning the additional spectrum among applications for it based, presumably, on the programming such applicants would propose to present.[89] The Corporation for Public Broadcasting might be the natural choice (in coordination with the FCC) for implementing this plan. But without adequate programming, and therefore the assured funding to develop and support that programming, the proposal collapses. To make the plan viable, therefore, Congress most likely would have to assure proper financing in a sophisticated way that would maintain the editorial independence of the stations while holding them accountable for their use of taxpayer dollars.[90] If current PBS stations and the proposed additional stations truly serve the public

[88] As the plan was originally formulated, it is not clear just what would comprise such educational programming or how localized or targeted to currently underserved audiences it should be. But the idea is that this programming clearly would be different from and complementary to that already available on PBS stations.

[89] Existing PBS stations might be given some preference in this regard, with some choice necessary in those markets with more than one PBS station. And, to maintain competition and keep such stations from viewing the additional channel as an entitlement regardless of how well they use it, other entities such as universities, libraries, or other media providers might be invited to submit bids for the spectrum, again based on programming.

[90] Here some imaginative ideas include earmarking for this purpose the revenues raised from fees digital commercial broadcasters are to pay for ancillary and supplementary uses of their new digital spectrum and from the anticipated auctions of reclaimed and repackaged analog spectrum.

interest, and not just some bureaucratic (and perhaps elitist) notion of the public interest, then the idea should be popular enough that Congress would be willing to adequately fund both current PBS operations and the proposed new channels.[91] Willingness to pay is a good measure of perceived worth; the "public interest" should not have to depend on some seemingly costless and unaccountable appropriation from commercial broadcasters. And the burden of establishing the public benefit of an expanded public broadcasting system should be spread among the public at large and not disproportionately imposed on commercial broadcasters.[92]

The Decherd proposal holds wonderful promise, yet the problems to be overcome to actually implement it are neither inconsequential nor insurmountable. The Media Institute therefore urges the FCC to abandon the expansive regulatory agenda of the NOI that makes no sense for the 21st century and instead devote the Commission's substantial expertise, talents, and resources to developing and presenting to Congress a practical, economically sound, and politically feasible plan modeled on the Decherd proposal.

But a necessary, integral component of this plan must be the comprehensive, concomitant deregulation of commercial broadcast television. A fundamental fallacy has pervaded broadcast regulation, namely that there are "good" and "bad" broadcasters and that the government must assure through "one-size-fits-all" regulation that all broadcasters are, by its definition, at least minimally "good."[93] There are, to be sure, good and bad broadcasters, just as there are good and bad newspapers. But it is not the role of the state to identify the bad and to "improve" them; if the

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[91] While government subsidies for speech are not free of First Amendment concerns, there is considerably more flexibility for government action here than with direct regulation of speech. *See National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998).

[92] See Thomas G. Krattenmaker and Lucas A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1732 & n.65 (1995) (if a media marketplace is perceived as "impoverished," "subsidies may be an effective way of correcting its inadequacies, so long as these are true subsidies rather than extractions from media competitors"; "[t]o be a subsidy the costs must be spread generally").

[93] *See* NOI, Separate Statement of Commissioner Gloria Tristani. *But see Lutheran Church-Missouri Synod v. FCC*, 114 F.3d 344, 355-56 (D.C. Cir. 1998) (the FCC's "purported goal of making a single station all things to all people makes no sense").

First Amendment means anything it precludes such state involvement. There is a long and unhappy history of government regulation of broadcasting[94] that should give great pause to anyone contemplating further tinkering; the likelihood is that things will be made worse, not better. A *free* press must include room for the mainstream and the elite, the boorish and the nonconformist, the traditionalist and the maverick, and even for irresponsible, rogue elements, both because this is the only way to assure true journalistic freedom and because all such elements make a real contribution to our wide-open, uninhibited, and uniquely robust free speech cacophony.

The additional public channels created under the Decherd proposal, together with traditional PBS stations and the programming many commercial broadcasters and abundant other media already willingly provide, would be more than sufficient to satisfy any reasonable "public interest" in broadcasting.[95] Whatever this public interest is, it is at most an interest in having certain programming readily available across the media marketplace, not an interest in forcing every media player to conform to an official standard of professionalism.[96] And it is certainly not an interest in coercing, or even inducing, the American public to watch that which some government officials think people ought to watch. The FCC and the American public should rely on willing, capable, and passionate public broadcasters, and similarly inclined other media programmers, rather than continuing to force unwilling and less-well-suited commercial broadcasters into a common, bureaucratically defined "public interest" mode.[97]

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[94] *See* Thomas G. Krattenmaker and Lucas A. Powe, Jr., REGULATING BROADCAST PROGRAMMING (1994); Lucas A. Powe, Jr., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987).

[95] *See* Eli Noam, *Public Interest Programming by American Commercial Television* (December 1997) (describing the huge growth and wide availability of public interest programming on commercial television, both broadcast and multichannel).

[96] Paraphrasing Alexander Meiklejohn, what is essential is not that every broadcast station serve all aspects of the officially declared public interest, but that the true public interest is served across the entire media landscape. *See* Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, at 25 (1948).

[97] As Gore Commission Member Frank H. Cruz, vice chairman of the board of directors of the Corporation for Public Broadcasting, put it: "Strengthening public broadcasting will maximize the educational impact of digital television far more readily than imposing additional operational mandates on reluctant commercial broadcasters." Frank H. Cruz, *Recommendations to*

The FCC would need compelling evidence -- evidence that does not exist beyond the mere desire of some -- that anything more is required to fully serve any conceivable 21st century public interest in broadcast television. Indeed, the additional available alternatives for all sorts of public interest programming that these new public channels and other burgeoning media represent would render the continuation of public interest obligations on commercial broadcasters especially suspect as a constitutional matter.[98]

## V. THERE CAN BE NO LINKAGE BETWEEN PUBLIC INTEREST OBLIGATIONS AND DIGITAL MUST-CARRY

The Media Institute takes no position here on the complex issue of must-carry for digital broadcasters that is the subject of a separate, ongoing FCC proceeding.[99] That issue, however, must be considered entirely on its own merits; there can be no linkage between current or additional public interest obligations on broadcasters and their entitlement to any degree of digital must-carry. Some broadcaster members of the Gore Commission clearly were pursuing a digital must-carry agenda,[100] and Commissioner Gloria Tristani's Separate Statement in the NOI also raises the specter of a relationship between digital must-carry and public interest obligations.[101] Any such "deal" would be wholly inappropriate.

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*the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters: Strengthening Public Television for the Digital Age (June 8, 1998).*

[98] *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (plurality) (1996) (even under less than strict scrutiny, the availability of reasonable alternatives is fatal to speech-restrictive government regulation).

[99] Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120, *Notice of Proposed Rulemaking*, 13 FCC Rcd 15092 (July 10, 1998).

[100] *See* James F. Goodmon, *A Proposal for a Minimum Level of Public Interest Requirements for All Stations and A Voluntary Broadcaster Code of Conduct*, June 8, 1998, at 7 (urging digital must-carry so cable subscribers can "benefit from the public interest programming of the digital broadcaster"); Final Report, at 83, 84, Separate Statement of Barry Diller (urging digital must-carry); Transcript, Nov. 9, 1998, at 150-51 (remarks of Barry Diller) (suggesting minimum public interest obligations for broadcasters in exchange for digital must-carry).

[101] NOI, Separate Statement of Commissioner Gloria Tristani.

For decades broadcasters have been "volunteered" into complying with all sorts of government mandates, most recently V-chip ratings and children's television processing guidelines.[102] As Commissioner Furchtgott-Roth has noted, "voluntary standards" have been a "favored tool" of FCC broadcast regulation but "provide a dangerous mechanism for the evasion of statutory limits on delegated authority."[103] The Commission cannot now purchase "voluntary" public interest obligations from broadcasters as a condition for particular results in the Commission's digital must-carry proceeding. Among other problems, such an approach would run headlong into the murky doctrine of unconstitutional conditions whereby "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[104]

Moreover, such an approach would undermine the validity of all must-carry rules. A sharply divided Supreme Court sustained the current must-carry rules only because a bare majority determined the rules are content-neutral and not based upon any particular nature of the programming on broadcast television.[105] Must-carry survived only because its purpose is simply to preserve free, local, over-the-air television regardless of its content. The Court noted that at most

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[102] *See* Robert Corn-Revere, *"Voluntary" Self-Regulation and the Triumph of Euphemism* in RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (The Media Institute, 1997, Robert Corn-Revere, ed.). In an earlier era this was regulation of broadcasting by a mere "raised eyebrow" of official disapproval. *See Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397, 407-08 (D.C. Cir. 1975) (statement of Bazelon, C.J.) (describing as "legion" a "whole range of 'raised eyebrow' tactics" of FCC regulation). *See also* Charles D. Ferris, Frank W. Floyd, and Thomas J. Casey, CABLE TELEVISION LAW, ¶ 3.11 n.5 (1985) (describing the origin of the "raised eyebrow" view of FCC regulation). *See generally* Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WISC. L. REV. 873 (1997).

[103] Harold Furchtgott-Roth, *Voluntary Standards Are Neither*, remarks before The Media Institute's Communications Forum luncheon (Nov. 17, 1998) <www.fcc.gov/commissioners/furchtgott-roth/sp.html>. *See also Lutheran Church,* 141 F.3d at 349 (describing FCC's "unusual legal tactics" when it wishes to avoid judicial review).

[104] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). *See FCC v. League of Women Voters*, 468 U.S. 364 (1984) (invalidating as unconstitutional a statutory provision requiring that public broadcast stations that receive federal funds from the Corporation for Public Broadcasting not "engage in editorializing").

[105] *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1184 (1997).

only a system of "minimal" broadcast regulation can withstand constitutional scrutiny. Indeed, "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."[106] Any *quid pro quo* of digital must-carry in return for broadcasters accepting additional public interest obligations would violate these basic principles.

## VI. THERE IS NO BASIS FOR ANY INTRUSIVE GOVERNMENT REGULATION IN ANY OF THE FOUR AREAS SPECIFICALLY TARGETED IN THE NOI

The Media Institute believes it is important for the record to be clear as to the highly problematic background and genesis in the Gore Commission of the proposals set forth in the NOI. Nonetheless, any specific public interest proposals must stand or fall on their own merit. The problem with the four areas discussed in the NOI is that while they may contain some nice, utopian ideas, there is no merit to any additional government regulation of broadcasting. That is, there is no justification, as there must be, for government mandates. This is the central point: No longer can broadcasting be regulated, consistent with the First Amendment, as a public utility subject to whatever "good" ideas regulators propose. If "good" ideas were all it took to "improve" a free press we ought to start with reform of the supermarket tabloids.[107] As Commissioner Furchtgott-Roth so trenchantly characterizes the NOI, it is largely just a "laundry list ... of 'freebies' to be extracted from broadcasters for various 'public' purposes -- most of questionable utility and legality." The NOI's "roving mandate to seek out 'good' things that we can make broadcasters do" has "little connection to broadcasting at all" let alone to the transition to digital. The "proposals are breathtaking in scope ... [with] dreams of creating a new Great DTV Society"; the NOI seeks to "cure virtually every social ill through the mandated largesse of broadcasters."[108] The Media

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[106] *Turner Broadcasting*, 512 U.S. at 650.

[107] *See Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) (government is "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one").

[108] NOI, Furchtgott-Roth Separate Statement.

Institute wholeheartedly shares these views; others may not. The essential point, however, is that the FCC cannot meet the applicable stringent standards for any of the sorts of new regulations discussed in the NOI.

A. Multicasting and Ancillary and Supplementary Services

The only aspects of the NOI that are at all related to the transition to digital broadcasting, and therefore to the reason for the NOI, are the opportunities in a digital system for broadcasters to multicast and provide ancillary and supplementary services. This latter set of services may generate fees [109] that the FCC might then use, under appropriate standards, to subsidize other programs such as the additional public stations contemplated by the Decherd proposal discussed above. But there is no basis for imposing generalized public interest obligations on these services, nor, in the age of Internet communications, for making broadcasters quasi common carriers for datacasting on behalf of certain favored public entities.[110] Whatever benefit broadcasters may derive from providing ancillary and supplementary services, beyond the fees they must pay, may help them compete and survive in the new and increasingly competitive video marketplace.[111] (But, as with all aspects of the transition to digital, it is not at all clear that broadcasters will derive *any* long term net benefit.) If they are successful at this, it will be because broadcasters truly serve the public interest as best measured in the media marketplace and not by a government agency.

As for multicasting, there is considerable irony in considering that throughout the 20th century the only mantra for regulating broadcasting in the face of the First Amendment was broadcasting's alleged peculiar characteristic of scarcity. Now that digital broadcasting brings the

[109] *See* Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996, MM Docket No. 97-247, *Report and Order*, 14 FCC Rcd 3259 (1998), *reconsid. denied*, 1999 LEXIS 5969 (Nov. 24, 1999).

[110] *See* NOI, at ¶ 13.

[111] Even the Gore Commission realized that Congress chose to structure the transition to digital so as to strengthen the competitive position of broadcasting and ensure the survival of universally available, free, over-the-air television. Final Report, at 9. Thus it is particularly perplexing why that Commission, or now the FCC, would defeat that key purpose by saddling broadcasters with a new set of intrusive and burdensome regulations.

prospect of multiplying several-fold the number and diversity of broadcast stations, one would think the logical and natural response would be to reduce if not eliminate regulation, not increase it. As broadcasters become multicasters, they approach the narrowcasting strategy of cable operators. Rather than programming one channel largely with bland programming to attract a large common-denominator audience, digital broadcasters will be able to appeal to different audiences on different channels. Thus even with common ownership, a multicaster should add considerable diversity to the airwaves in response to market forces, not governmental edict. In a world of media abundance it would be unfortunate enough to continue, let alone increase, the full panoply of public interest obligations on a digital broadcaster's "primary" channel; it makes no sense whatsoever to extend such mandates to other channels in the digital age of unlimited viewer choice and ample opportunity for niche programming.

B. Community Responsiveness

The same expanded opportunities for broadcasters to program multiple, diverse channels will enable them to better serve the interests and needs of their viewing public as best determined in the competitive marketplace. Broadcasters will have to do this in order to survive in a vastly transformed and converging world of electronic communication. If the public finds it is not being well served by broadcasters, audiences will quickly migrate, as many already have, to a plethora of alternatives that are readily available, both physically and economically. And if other media entities displace broadcasters as the main sources of information, education, and entertainment -- that is, if a majority of the public finds itself better served elsewhere -- that is not a proper concern for a government agency.[112]

[112] At least it is not a concern to be addressed by programming regulation as opposed, perhaps, to content-neutral subsidies such as support for public broadcasting or the must-carry rules.

1. Disclosure Obligations

There is, thus, no basis for enhanced disclosure obligations covering broadcasters' public interest programming and activities. To begin with, it is not as though broadcasters' programming is secret information that needs government mandates to be brought to light as with, say, campaign contributions. The public seems to know full well how to find the programming it desires throughout the expanding video marketplace. Media critics also suffer no lack of information. Moreover, the kind of enhanced disclosures and standardized check-off forms discussed in the NOI seem to be relatively innocuous but in fact mask a pernicious, intended effect.[113] Who determines the categories to be covered? Why, for example, should there be a category for "contributions to political discourse" or "programming that meets the needs of underserved communities" (whatever these latter might be) and not a category for, say, "sports programming"? Who determines what counts as "public interest" programming and on what basis? Whoever chooses the favored categories of programming demanding quantified responses exerts subtle but real pressure on broadcasters' editorial policies. Broadcasters will be pressured into developing and categorizing their programming in a way designed to avoid low figures in the officially approved lexicon. Though in any given category half of broadcasters will be below average, none will want to be so described by the agency that renews its license or by "public interest" pressure groups. The coercive pressure of such guidelines is the real point of the proposed enhanced disclosure requirements, but such pressure is quite inappropriate.[114] In the digital age of unlimited viewer choice, the only "disclosure" necessary of how well a broadcaster is serving the public interest are figures about its market share; these say it all.

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[113] NOI, at ¶ 15.

[114] *See Lutheran Church*, 141 F.3d at 352-53 (describing improperly coercive effect of FCC equal employment opportunity guidelines).

2. Disaster Warnings

No one can quarrel with the government's desire to provide an efficient and effective system for disaster warnings, but the disaster warning issues the NOI raises[115] are especially noteworthy for their focus solely on television broadcasters. In this regard this narrow issue well illustrates that broadcasting can no longer be treated, practically or constitutionally, as a peculiar medium of communication. In a digital age of instantaneous electronic communications by cable, satellite, the Internet, and wired and wireless cellular telecommunications, does broadcast television really have such a unique role to play in providing real-time disaster warnings? Aren't some of these other technologies -- paging systems, for example -- as least as well or even better suited to this task in many situations? And if we are to develop a truly efficient, enhanced system of disaster warnings, isn't the best role for government one of coordinating and encouraging through subsidies its rapid implementation? These are the more appropriate issues for an NOI.

C. Enhanced Access to the Media

As with disaster warnings, it is impossible to quarrel with the ultimate aim of enhancing access to the media by people with disabilities. But again, there are real questions as to the appropriate role of government. On the one hand, enhancing media access by people with disabilities expands the audience market for any media entity. In the current hotly competitive video market, therefore, there should be considerable market incentives for broadcasters as well as others to expand the availability of their products through closed captioning, video description, and similar services. On the other hand, at some point it may become uneconomical for a broadcaster to implement additional such measures to marginally increase its potential audience among a particular group. If so, we again urge that the FCC not think reflexively, as it has for so many decades, simply in terms of what it thinks it can force broadcasters to do as opposed to creative approaches to government subsidies to encourage greater opportunities.

[115] NOI, at ¶¶ 18-19.

While the ultimate goal of enhanced access surely is laudable, government mandates are hardly free from difficulty. Could the government, for example, require the NEW YORK TIMES to provide, at no cost, sight-impaired readers with a large-type print or braille edition, or an audio cassette, if the company itself were unwilling to do so? After all, such access to this country's premier newspaper of record is arguably far more important than comparable access to most of the daily fare on broadcast television. Can some entities heavily associated with the Internet -- Microsoft, for example, or an online provider such as America Online -- be required to develop and distribute software enabling visually impaired persons to use the Internet? The constitutional problem is particularly acute for video description, which the Commission is currently considering.[116] Video description would require broadcasters and other programming distributors to actually create the speech -- the narrative descriptions of key visual elements such as settings, gestures, costumes, and actions not otherwise reflected in a program's dialogue -- they then are forced to disseminate. Such requirements are particularly offensive to basic notions of free speech and a free press.[117]

Instead of pursuing its usual regulatory mode, we urge the FCC to look for guidance to abundant examples worldwide of how software (and hardware) has been developed -- largely through private efforts with perhaps some organizational or government support in the form of research and development or subsidies -- to make computers, and especially the Internet, readily available to people with all sorts of disabilities.[118] Electronic media technologies are rapidly

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[116] Implementation of Video Description of Video Programming, MM Docket No. 99-339, *Notice of Proposed Rulemaking* (Nov. 18, 1999).

[117] *See Hurley*, 515 U.S. at 573-74 ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.... [O]ne who chooses to speak may also decide 'what not to say.' ... [T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.").

[118] *See, e.g.*, information about IBM's Home Page Reader that "orally communicates web-based information just as it is presented on the computer screen" available at <www.austin.ibm.com/sns/hpr.html> and <www.austin.ibm.com/sns/ hprctg.htm>; Debra Nussbaum, *Web Access for the Blind*, N.Y. TIMES, Dec. 10, 1998, at D10; Constance Holden, *Leveling the Playing Field for Scientists With Disabilities*, SCIENCE, Oct. 2, 1998, at 36; Judy Siegel, *A Seeing-Eye Mouse*, JERUSALEM POST (N. Amer. ed.), Jan. 11, 1999, at 15 (start-up Jerusalem company has developed

converging in the digital era,[119] and government support and encouragement for the willing endeavors of many media entities,[120] not constitutionally troubling mandates, is the proper approach to achieve the undoubtedly important and worthwhile goal of increasing access.

Indeed, there is an additional, crucial salutary effect of adopting such an approach in this area in which, unlike many other aspects of public interest obligations, everyone can agree that the goal is extremely important and highly laudable. Regulation is the natural, first response. But staying the regulatory hand even here will begin to reverse the peculiar mindset that is no longer tolerable, namely that of a broadcast media, ostensibly an important segment of this country's free press, yet subject to the will of a federal agency in the name of an amorphous public interest.[121]

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hardware and software system allowing blind to "feel" graphics on a computer screen, "read" any alphabetical text from a program or the Internet, and even play games). *See generally* Telecommunications Access Advisory Committee, *Access to Telecommunications Equipment and Customer Premises Equipment by Individuals with Disabilities,* Final Report, January 1997.

[119] *See, e.g.*, Rik Fairlie, *Television and the Net Converge*, N.Y. TIMES, Jan. 16, 2000, at Sec. 2, p. 1; Clea Simon, *The Web Catches and Reshapes Radio*, N.Y. TIMES, Jan. 16, 2000, at Sec. 2, p. 1.

[120] *See generally* Thomas W. Holcomb, Jr., *The Art of Reading Television*, N.Y. TIMES, Jan. 31, 2000, at C15.

[121] Eliminating this mindset is especially crucial when the FCC inappropriately flirts with the highly charged notion of increasing "diversity" in viewpoint and programming on broadcast television. NOI, at ¶¶ 29-33. As one court recently put it, all too often government "intonation of the rubric 'diversity' is a thinly disguised reference to its preference for [certain] editorial content." *Time Warner Cable v. New York*, 943 F. Supp. 1357, 1397 (S.D.N.Y. 1996), *aff'd*, 118 F.3d 917 (2d Cir. 1997). If anything clearly should be constitutionally off-limits to federal regulators it is the idea of even considering tinkering with such an undefined and undefinable notion as "diversity." *See Lutheran Church*, 141 F.3d at 354-55 ("The Commission never defines exactly what it means by 'diverse programming.'" And, "[a]ny real content-based definition of the term may well give rise to enormous tensions with the First Amendment"). *See also* Review of the Commission's Regulations Governing Television Broadcasting, *supra* note 50, Dissenting Statement of Commissioner Harold Furchtgott-Roth (noting the "lack of any benchmark for measuring diversity" and that the FCC "has failed to define the substance of the term 'diversity'");1998 Biennial Regulatory Review, *supra* note 45 at 11304, Separate Statement of Commissioner Michael Powell (diversity is a "visceral matter -- bathed in difficult subjective judgments and debated in amorphous terms. It has always been difficult to articulate clearly the government's interest in 'diversity.'").

D. Political Discourse

The immediate impetus for creation of the Gore Commission was the Administration's acknowledged desire to devise a means and rationale to require television broadcasters, alone among the media, to provide free air time for political candidates. This is particularly curious because, while the need for campaign finance reform may be real, this problem has little to do with broadcasting *per se* and absolutely nothing to do with broadcasters' conversion to digital. So, there is no rationale for imposing new obligations now on broadcasters other than the fact that some people think it a good idea and, as usual, broadcasters are an easy target. But a good idea is not sufficient justification for controlling the editorial discretion of broadcasters. And, as Commissioner Furchtgott-Roth notes, "free" air time is not a good idea; it is "just bad policy." It will simply shift costs of campaigning from candidates' willing contributors to the decidedly unwilling broadcast industry and American consumers.[122]

The idea of requiring any form of free air time for candidates is not only pragmatically, statutorily,[123] and constitutionally highly dubious[124] but, as the NOI indicates, it is politically contentious and a minefield for the FCC. Especially considering the unfortunate appearance created by the timing of this NOI and the ongoing presidential campaign, The Media Institute respectfully suggests that this issue should not be before the Commission.

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[122] NOI, Furchtgott-Roth Separate Statement.

[123] *Id.* n.4

[124] *See* Rodney A. Smolla, *Free Air Time for Candidates and the First Amendment,* Paper No. 2, ISSUES IN BROADCASTING AND THE PUBLIC INTEREST (The Media Institute, 1998); Douglas C. Melcher, *Free Air Time for Political Advertising: An Invasion of the Protected First Amendment Freedoms of Broadcasters*, 67 GEO. WASH. L. REV. 100 (1998). Lillian R. BeVier, *Is Free TV for Federal Candidates Constitutional?*, American Enterprise Institute (1998) (distributed as an attachment to P. Cameron DeVore, *The Unconstitutionality of Federally Mandated "Free Air Time,"* submitted to the Gore Commission on March 2, 1998).

The constitutional guarantee of free speech has its "fullest and most urgent application" in political campaigns.[125] The FCC would bear a "well-nigh insurmountable" burden to justify further interfering with how broadcasters cover campaigns or provide candidates with air time.[126] The Commission would have to satisfy exacting scrutiny by demonstrating a compelling interest that is both narrowly tailored and necessary;[127] the Commission cannot do so.[128] This alone is overwhelming reason for the Commission to proceed no further.

Moreover, as the NOI acknowledges,[129] broadcasters themselves, as a matter of professional journalism, are experimenting with various new and better methods for covering political campaigns, at least at the federal level.[130] They should be left free to continue in these efforts and not impeded by government intervention. We certainly do not need more 30- and 60-second political ads that candidates might choose to run if they are available free of charge. But just what is the "candidate-centered discourse" that some promote?[131] Assuming, as is unlikely, that it can be adequately defined, why is this the favored form of campaign speech? And who will monitor compliance and how? The very best thing the FCC can do to encourage and promote voluntary efforts by broadcasters to enhance the political information and debate available to the

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[125] *Brown v. Hartlage*, 456 U.S. 45, 53 (1982), *quoting Monitor Patriot C. v. Roy*, 401 U.S. 265, 271-72 (1971).

[126] *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (state prohibition against paying circulators of initiative petitions violates First Amendment).

[127] *Id.* at 420, 426; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). The NOI at ¶ 34 relies on *Arkansas Educational Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1640 (1998), but the Court there upheld the discretion of the broadcaster as to how it handled campaign coverage, specifically debates.

[128] Indeed, it is not even clear that old, limited statutory provisions such as 47 U.S.C. §§ 312(a)(7) and 315 could survive reexamination in the current radically transformed media environment.

[129] NOI, at ¶ 35.

[130] And broadcasters are hardly the only, or even still the most important, sources for campaign coverage. *See, e.g.*, Joe Schlosser, *CNN's Kind of Story*, BROADCASTING & CABLE, March 13, 2000, at 54 (CNN is pulling out all the stops in coverage of presidential campaigns).

[131] NOI, at ¶ 37.

public is to remove the threat of any additional regulation, a threat that will only stifle such efforts for fear they will be turned into mandates.

Appropriate competitive forces also are at play as, increasingly in just the last couple of years, a great deal of political information, communication, and debate has shifted to the Internet. There now is a "booming, buzzing electronic bazaar of wide-open and uninhibited free expression."[132] Incredibly, the Gore Commission, charged to look to the digital future, refused to consider this single most revolutionary change in the electronic information age especially as it can promote truly meaningful communication with voters.[133] The FCC should not perpetuate this error, as the increasingly important roles of the Internet and cable television in covering politics may indicate a correspondingly diminishing role for broadcast television and belie any need for constitutionally troubling regulation. As with so much current regulation of broadcasting, the FCC should begin *de novo* with empirical reconsideration of broadcasting's current role as one among many burgeoning forms of electronic media, and with renewed appreciation of constitutional first principles.

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[132] Smolla, *supra* note 124, at 5.

[133] *See* Tina Kelley, *Candidate on the Stump Is Surely on the Web*, N.Y. TIMES, Oct. 19, 1999, at 1; Rebecca Fairley Raney, *Politicians Woo Voters On the Web*, N.Y. TIMES, July 30, 1998, at D1. *See generally* THE DEMOCRACY NETWORK (DNet) at <www.dnet.org> created by the Center for Governmental Studies and the League of Women Voters Education Fund. DNet is an interactive and unfiltered Web site "designed to improve the quality and quantity of voter information and create a more educated and involved electorate.... DNet encourages candidates to address a wider range of issues, and to address those in greater depth, than they might in other media. Our goal is to increase voter understanding of important public policy problems, allow candidates to debate their positions in an "electronic townhall" before online audiences, reduce the pressure on candidates to raise campaign funds, foster greater civic participation and interaction between voters and candidates, and create new online political communities."

## VII. CONCLUSION

As Justice Stewart once noted, "[t]here is never a paucity of arguments in favor of limiting the freedom of the press."[134] For historical and other reasons, our legal system came to accept, for most of the 20th century, the notion that broadcasting was somehow unique and that it was appropriate to treat the industry more like a regulated utility than a free and vibrant part of the press. The law can no longer continue in this vein;[135] times are changing at an ever-accelerating pace. The revolutionary transformations in media and communications we are experiencing as we begin the next millennium require us to rethink our regulatory approach to broadcasting and return to first principles. Once again Justice Stewart is being proved correct; there is a plethora of voices and rationales being advanced to hold onto an old, familiar, and, to some, comfortable regulatory system. The challenge, however, is to address outdated assumptions with a fresh skepticism and the essential command of the First Amendment firmly in mind.

The Media Institute therefore urges the Commission to abandon its outmoded current NOI in favor of a new approach focusing on expanding and strengthening public television as discussed above, while finally welcoming commercial broadcasting to the ranks of a truly free press. This would be a meaningful and fitting fulfillment in the 21st century of the FCC's historic mandate to advance the true public interest.

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[134] *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 144 (Stewart, J., concurring).

[135] *See* Commissioner Michael K. Powell, *Technology and Regulatory Thinking: Albert Einstein's Warning*, speech before the Legg Mason Investor Workshop, Washington, D.C. (March 13, 1998) <www.fcc.gov/commissioners/powell/> (describing as no longer tenable the "regulatory balkanization [that] was sustainable in the era before digitalization").

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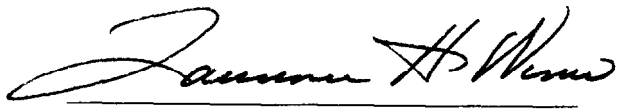
Respectfully submitted,



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